United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-1278

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 76-1278
76-1327

BP/s

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT L. VAN MEERBEKE, DONALD M. JONES,

Appellants.

On Appeal From The United States District Court
For The Eastern District of New York

JOINT PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,		
Appellee,	:	Docket Nos.
v.	:	76-1278 76-1327
ROBERT L. VAN MEERBEKE, DONALD M. JONES,	:	
Appellants.	:	

PETITION FOR REHEARING

On December 27, 1976, a panel of this Court* affirmed the convictions of Robert Van Meerbeke and Donald Jones for importing opium into the United States, 21 U.S.C. §952(a), 18 U.S.C. §2, and conspiracy to commit that offense, 21 U.S.C. §963; rejecting appellants' claim that the ingestion of opium by the Government's chief witness during his testimony, unbeknownst to counsel, required reversal of the convictions.

The Government's principal witness was Rueben Fife, a co-conspirator and an important participant in the illegal scheme. At some point during his testimony on March 25, 1976, the first day of the trial, Fife ingested a piece of opium taken from a Government exhibit. This action was not perceived by either prosecution or defense counsel. It was

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* The panel consisted of Chief Judge Kaufman, and Circuit Judges Oakes and Gurfein.

observed by the trial judge, Judge Bramwell, and possibly some jurors as well.

Judge Bramwell made no comment nor did he take any action in response to the incident. It was not until a similar incident of opium eating by the witness occurred four days later - this time observed by defense counsel - that counsel learned of the prior ingestion.

On appeal, appellants contended that Judge Bramwell's inaction during the first opium ingesting incident constituted reversible error. The panel concluded that Judge Bramwell's silence after the first incident, while "a serious abdication of his responsibility" amounting to "error", did not affect the judgment.

It is respectfully submitted that, in applying this standard of harmless error, the panel failed to apprehend the true nature and effect of the error and its attendant departure from the constitutional norm. Because of the pervasive impact the error may have had on the judgment, the panel should rehear the case and reassess in light of a more appropriate and stringent standard.

HARMLESS ERROR

Rule 52 of the Federal Rules of Criminal Procedure states:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Pursuant to Rule 52(a), the focus of the analysis should be whether the error affected substantial rights of the defendants. Here, substantial rights of the defendants were affected.

Judge Bramwell's failure to inform counsel after having observed Fife ingest opium on the witness stand, while allowing his crucial testimony (the bulk of the Government's case) to continue, in effect, excluded appellants from one of the trial's events in violation of their right to be present "at every stage of trial". Fed R. Crim. P., Rule 43(a). This right is an "unequivocal mandate." United States v. Glick, 463 F.2d 491, 493 (2d Cir. 1972).

Appellants' right to be present under Rule 43 serves as a protection against ex parte communications between the court and the jury, Rogers v. United States, 422 U.S. 35 (1975), such as occurred in the trial below. In such situations, there is a "presumption of prejudice". United States v. Treatman 524 F.2d 320, 323 (8th Cir. 1975).

In addition, the appellants right to confront the witness' true demeanor and to have the jury fairly appraise the witness' credibility and competency was violated when the trial judge allowed the testimony to continue after having observed him ingest opium.

This violation tainted a significant portion of the Government's case.*

While, as the panel noted, Judge Bramwell left the determination of Fife's competency and credibility to the jury, the jury was not allowed to consider the effect of the opium on Fife's testimony until after he had completed his testimony on direct and cross-examination.

The panel answers appellants' claims that Fife was rendered incompetent per se by the influence of drugs by referring to Rule 601 of the Federal Rules of Evidence. The panel notes that "this question is one particularly suited to the jury as one of weight and credibility," yet finds that Judge Bramwell's withholding of the information necessary to the jury's determination was proper. Slip op. at 1130, n.3.

* Fully three-quarters of the Government's case was presented through the testimony of Fife, a witness repeatedly under the influence of opium. The Government's case encompassed 326 pages of the record, of which Fife's testimony occupied 250 pages.

The inconsistency is patent. The jury did not have knowledge of the possibility that Fife's testimony and demeanor was tainted by drugs until after the fact. Thus the question, "while particularly suited to the jury", was kept from them by the trial judge. Surely, the Advisory Committee Report to Rule 601 did not contemplate ex post facto determinations by the jury.

The Rule 43 violation and the violation of appellants' right to confront Fife and to have the jury assess his credibility sans opium is grounded upon their Sixth Amendment right to a fair trial as well as their Fifth Amendment right to due process of law.

Thus the error affected substantial rights of appellants and cannot be disregarded. Rule 52 (a), F.R. Crim. P.

The Supreme Court has held that the harmless error doctrine is applicable to constitutional errors. However, when the error affects constitutional rights, the government has the burden of proving the error harmless, and the conviction must be reversed unless the court is "able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California , 386 U.S. 18,24 (1967).

Here, where the error is of constitutional magnitude, and where the absence, or disbelief, of Fife's testimony would have proved fatal to the Government's case, the error must be subjected to the scrutiny of the strict standard enunciated in Chapman, supra. As this Court noted in United States v. Glick, supra, at least two circuits have explicitly adopted the Chapman standard. United States v. Arriagada, 451 F.2d 489 (4th Cir. 1971); Ware v. United States, 376 F.2d 717 (7th Cir. 1967). It is respectfully submitted that the trial judge's egregious departure from the constitutional norm, affecting appellants' Fifth and Sixth Amendment rights, requires the panel to apply the Chapman standard in assessing the effect of the error.

While this Circuit has not determined which standard to apply with regard to harmless error, See United States v. Glick, 463 F.2d 491 (2d Cir. 1972), the standard normally applied in federal cases is set forth in Kotteakos v. United States, 328 U.S. 750, 764-65 (1946):

> If, when all is said and done, the conviction is sure that error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened

> without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. Id.

Thus, the record must be reviewed to determine what effect the error might have had upon the jury's decision to convict. In the present case, the panel reviewed the record only to find that the error did not "affect the judgment". In so doing, it is respectfully submitted that the panel failed to apprehend the fact that the judgment rested primarily upon the testimony of a witness whose testimony was given while under the influence of opium. Indeed, without the testimony of this crucial witness, the Government's case could not have survived a Rule 29 motion by the defense. Thus, even under the lesser standard articulated in Kotteakos, it cannot be said with certainty that the judgment was not substantially swayed by the error.

Accordingly, given the unsettled state of the law in this Circuit with respect to harmless error and in light of the pervasive effect of the error in the present case, the Court should grant the petition for rehearing in order to evaluate the egregious error by a more appropriate standard.

CONCLUSION

THE PETITION FOR REHEARING SHOULD BE GRANTED.

Respectfully submitted,

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C 321—Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff

against

ROBERT L. VAN MEERBEKE and
DONALD M. JONES,

Defendant

Index No. 76-1278
76-1327

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 69-84 137th Street, Flushing, New York 11367

That on the tenth day of January 1977 deponent served the annexed

on Douglas J. Kramer, Assistant United States Attorney
attorney(s) for United States of America
in this action at 225 Cadman Plaza East, Brooklyn, N.Y.
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me
this 10th day of January 1977

Judith Gerowitz
The name signed must be printed beneath
Judith Gerowitz

Edward M. Chikofsky
Notary Public: State of New York
No. 31-9821444
Qualified in N.Y. County
Comm. Exp. 3/30/78